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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

W. S. SIMMONS (ROSA F. SIMMONS, Temporary Administratrix substituted in place of W. S. Simmons, deceased), Petitioner,

v.

PEAVY-WELSH LUMBER COMPANY, Respondent.

No. 379

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, rendered on June 17, 1940, and affirming the decision of the District Judge dismissing the complaint upon motion is reported in 112 F. (2d) 662. The opinion of the Circuit Court of Appeals denying plaintiff-appellant's petition for rehearing is unreported but is set out in full in the record at pages 112-114. Also, the opinion of the District Judge, contained in full at pages 90-93 of the record, is unreported.

Statement.

This is a broker's suit for a commission in connection with the sale of certain timber or timbered lands. The declaration is in two counts, the first count purporting to allege an express contract, and the second, an implied contract to pay the reasonable value of services rendered.

The original complaint was filed before the new Federal Rules of Civil Procedure went into effect. They became effective, however, before the time for filing defensive pleadings arrived, and pursuant to Rule 86, the Court finding that no injustice would be worked and that it was feasible, the case proceeded under the New Rules.

The plaintiff's original complaint contained more than forty paragraphs in the first count; the second count, by adopting paragraphs of the first, slightly more. There were thirty-three exhibits (letters, etc.) to the complaint, much of which in the language of the District Judge "was quite irrelevant and not even between the parties to the suit." An additional letter was added by amendment, (R. 90, 81).

Motions were made by the defendant for a bill of particulars, to strike certain portions of the petition and to dismiss the petition on the ground that it failed to state a claim upon which relief could be granted. Subsequent to the filing of these motions, plaintiff offered three amendments to the petition, the last of

which was never allowed by order of the Judge. Defendant's motion to dismiss then was renewed and was sustained.

Numerous conferences were held by the Court with counsel, in the manner provided by Rule 16, to determine the necessity or desirability of amendments to pleadings, to consider simplifying the issues, and to have plaintiff's counsel point out with certainty those exhibits relied upon as making a contract between the parties, (R. 90). All that could be accomplished was that after each conference with the Judge the plaintiff would offer a further amendment, referring to large numbers of the exhibits previously pleaded, and reasserting that they generally constituted a contract between the parties. The Court was, therefore, left to work out its own conclusions without the aid of specific indication by the plaintiff's counsel as to what portions of the exhibits were relied upon to show a contract between the parties, (R. 91).

The pleadings first filed alleged that the president of the defendant corporation gave written authority to defendant "to sell all of the Georgia timber and lands" owned by defendant, and referred to a letter (Exhibit "B" of the original petition) as showing the engagement, (R. 7, 36). The exhibit so referred to does not show any engagement of the plaintiff by the defendant but on the contrary shows that the letter was written in reply to an earlier communication from

the plaintiff to defendant in which he stated that he had a prospect in mind who would buy the defendant's property. All that was said in this letter was that if the plaintiff would tell the defendant frankly who his prospect was and the defendant could make a deal with him, he would pay 2% commission. (The suit, however, is for 3% commission.) It is not contended that this prospect of the broker ever purchased any portion of the property; nor did the plaintiff furnish his name to defendant as suggested.

The negotiations between the parties to this case extended over a period of nearly two years; they began on April 6, 1934, and apparently terminated February 3, 1936, (R. 35, 71). It clearly appears from the pleadings that at no time during that period did the plaintiff ever sell the timber or timbered lands or produce a purchaser ready, willing and able to buy or who did actually buy the same. The complaint also shows that under no view of the matter could it be said that the plaintiff had any exclusive agency to sell the property.

By amendment plaintiff sought to change the nature of the alleged engagement by saying that instead of being employed to sell the property he was merely engaged to furnish to the defendant the names of prospective purchasers with whom and to whom defendant might be able to conclude a sale, (R. 75). The same letters were relied upon in the amendment as in the original complaint to show the contract.

The plaintiff appealed from the decision of the District Court sustaining the motion to dismiss the complaint as amended and assigned as error the dismissal of the petition and the ruling of the Court that no cause of action was set out. While the case was pending in the Circuit Court of Appeals for the Fifth Circuit, plaintiff-appellant died intestate, and the administratrix of his estate was substituted in his place by an appropriate order of the Court.

The Circuit Court of Appeals affirmed the judgment of the District Judge, with one Judge dissenting. A petition for rehearing, filed by plaintiff-appellant, was denied. Plaintiff has applied to this Honorable Court for a writ of certiorari to review the judgment of the Court of Appeals, alleging in substance that such judgment is contrary to the true intent of the New Federal Rules of Civil Procedure and contrary to the decisions of other circuits construing the Rules. Petitioner also asserts that the decision of the Circuit Court of Appeals is in conflict with applicable local decisions and constitutes a departure from the accepted and usual course of judicial proceedings.

ARGUMENT

I.

Introduction.

Generous opportunity has already been afforded plaintiff[1] to establish the sufficiency of his alleged claim. Scant reflection by even the most liberal constructionist should compel the conclusion that the petition for certiorari is without merit and that the issue presented is not of sufficient importance to justify the issuance of the writ. A consideration of the decisions of the Courts below must surely indicate that they are in perfect accord with applicable decisions of other Federal Courts under the New Rules of Civil Procedure and that there is no conflict in their substantive effect with applicable local decisions. The procedure followed by the District Court and by the Court of Appeals was entirely regular and afforded petitioner every advantage required for the enforcement and protection of his rights.

II.

The petition for certiorari does not present any novel question of Federal procedure which requires decision by this Court.

It is not entirely clear from the petition for certiorari and from plaintiff's brief in support thereof just what question of Federal procedure is presented

1. Petitioner is designated "plaintiff" and "petitioner" interchangeably in this brief, and respondent is designated "defendant." References are made to the parties without regard to the substitution of parties-movant.

which requires the attention of the Supreme Court. Plaintiff expresses surprise that the judges below regarded the construction and sufficiency of his pleadings as a legal question. It is the evident view of plaintiff's counsel that some questions of fact were left in doubt by the pleadings and required determination by a jury.

Petitioner finds comfort in the assertion of the dissenting Judge in the Circuit Court of Appeals that the effect of the decision of the majority was to dispose of the case on the merits without giving plaintiff an opportunity by proof to put the merits before the Court. It is manifest from the opinions filed that the sole difference in the views of the several Judges was with respect to the proper construction of plaintiff's pleadings. There was no controversy as to the substantive principles controlling. The majority were simply of the view that the allegations of the amended complaint, which were drawn from the writings allegedly establishing the contract and which constituted merely the plaintiff's interpretation of such writings, were contradicted by the writings attached as exhibits and that therefore the true construction of the exhibits should prevail. The Court found that the allegations as to an oral contract were dependent upon, and not at variance with, the alleged written terms of the contract and that such allegations added nothing to the plaintiff's claim. There is nothing in the record from which it may be inferred that all of the allegations of fact in

the complaint were not accepted as established for purposes of deciding upon the issue raised by the motion to dismiss. Thus, there could be no issues of fact for determination by a jury since the claim alleged was held to be insufficient in law. The result reached is amply sustained by the record, and followed the well-established practice under our system of law.

The New Federal Rules[2] permit a motion to dismiss when the complaint fails to state a claim upon which relief can be granted. The question raised is, and always has been, a legal question for determination by a Court. The action of the majority followed time-honored precedent and was required by the facts appearing of record.

III.

The decision of the Circuit Court of Appeals does not violate the true intent of the Federal Rules of Civil Procedure and is consistent with the construction followed in other Circuit Courts of Appeals.

Petitioner asserts that the decisions in *Sierocinski v. Dupont*, 103 F. (2d) 843 (C. C. A., 3d, 1939); *Leimer v. Mutual Life Assur. Co.*, 108 F. (2d) 302 (C. C. A., 8th, 1940); and *Herman v. Mutual Life Ins. Co.*, 108 F. (2d) 678 (C. C. A., 3d, 1939), correctly construe the New Federal Rules and that the decision of the Court of Appeals in this case is in conflict with those decisions. There is no difficulty in harmonizing all of these cases. All of the cases referred to by peti-

2. Rule 12 (b) (6).

tioner illustrate instances where Federal Courts have exercised the utmost liberality in the construction of plaintiff's pleadings, and petitioner infers from the opinions that a Court must always construe a plaintiff's pleadings in his favor. It is indisputable that the Courts there resolved every doubt in favor of the respective plaintiffs. In so doing, however, the several Courts did not deprive the defendants of "substantial justice."

By way of illustration, the decision in the *Sierocinski* case, *supra*, goes no farther than prior holdings upon the sufficiency of general allegations of negligence in a declaration. The books abound in decisions which hold that a general allegation of negligence is sufficient to sustain a pleading against a general demurrer.

Similarly, in the *Leimer* case, *supra*, it took no violent construction to sustain the petition as against a motion to dismiss. The construction of the Court was manifestly reasonable and effected substantial justice.

The *Herman* case, *supra*, demonstrates that a petition may be subject to dismissal for its failure to state a claim upon which relief may be granted even though every possible doubt of construction is resolved in favor of the plaintiff. There is no inference in that decision or in the other decisions relied upon by plaintiff that the Court must in all cases construe a plaintiff's pleadings in his favor. On the contrary, the use of the term "substantial justice" in the New Federal Rules implies

that consideration will be given to the interests and rights of all parties to the litigation. That is to say, all that is required is a reasonable and sensible construction of the pleadings. Under the practice before the New Rules, it was generally held that pleadings should be most strictly construed against the pleader. *Driskell v. Powell*, 67 F. (2d) 484 (C. C. A., 5th, 1933); *Hartline v. Mutual Assn.*, 84 F. (2d) 21 (C. C. A., 5th, 1936). Moreover, it was held that a demurrer should be sustained if there was substantial doubt respecting the sufficiency of the plaintiff's alleged claim. *Mitchell Woodbury Corp. v. Albert Pick-Barth Co.*, 36 F. (2d) 974 (D. C., Mass., 1929). Certainly this salutary principle has not been abrogated to the extent of resolving every doubt in a plaintiff's pleadings in his favor. The pleadings must be reasonably and sensibly construed, and plaintiff's pleadings must be held inadequate when a reasonable construction of the facts pleaded determines that there can be no recovery under applicable substantive law.

The plaintiff urges that his amended complaint satisfies the requirements of Rule 8 (a) of the New Rules of Civil Procedure. It should be noted that subdivision 2 of this Rule requires that the pleadings shall contain "a short and plain statement of the claim, showing that the Pleader is entitled to relief." Whether the pleader is entitled to relief upon the claim asserted is a matter to be determined under the substantive law of the applicable jurisdiction. Thus, where a complaint

would be subject to general demurrer in the applicable local jurisdiction, the Federal Courts, being bound to apply the substantive law of such jurisdiction in testing the sufficiency of the pleading, must likewise determine that the facts alleged are not sufficient to constitute a claim upon which recovery may be had.

There is nothing in any of the opinions filed in the Courts below which is in anywise inconsistent with the results in, and the principles to be derived from, the decisions from other circuits referred to by petitioner. There is no indication in the language of the opinions or in the result reached that as a matter of actuality every indulgence was not granted to the plaintiff in this case.

IV.

The judgment of the Circuit Court of Appeals resolved a pure question of law and does not in anywise constitute a determination of any questions of fact; the Court followed the accepted and usual course of judicial procedure in disposing of a motion to dismiss.

There is no novelty in the manner in which the District Court and the Circuit Court of Appeals disposed of defendant's motion to dismiss. Rule 12 (b) (6) of the Rules of Civil Procedure provides that a motion to dismiss may be sustained when the petition fails to state a claim upon which relief can be granted. Following older procedural devices, this motion tests the legal sufficiency of the facts pleaded, and accepts as established, for purposes of the motion, the facts alleged.

It cannot be assumed in the present case that the Court below did not regard as established all of the facts alleged, for purposes of the motion. There is no indication whatsoever that the decision was reached by reason of any feeling of the Court that all of the facts alleged could not be established by proof. On the contrary, it is apparent that the judgment of the Court was based upon the construction of the pleadings by the majority that the exhibits to the amended complaint were contradictory of, and therefore superseded, the allegations of the complaint and that the allegations with respect to oral terms of the alleged contract added nothing to the allegations as to the writings.

There can be no quarrel with the rule of construction enunciated by the Circuit Court of Appeals to the effect that where there is a conflict between allegations in a pleading and exhibits thereto, the exhibits control. This principle is well established in the State Courts as well as in the Federal Courts. *Southern Surety Co. v. Commercial Casualty Ins. Co.*, 31 F. (2d) 817 (C. C. A., 3d, 1929), *cert. den.*, 280 U. S. 577 (1929); *Welch v. Warner Co.*, 47 F. (2d) 231 (D. C., N. Y., 1930), *affd.*, 47 F. (2d) 232 (C. C. A., 2d, 1931); *Frigorifico Wilson v. Weirton Steel Co.*, 62 F. (2d) 677 (C. C. A., 4th, 1933); *Bethlehem Eng. Export Corp. v. Christie*, 26 F. Supp. 121 (D. C., N. Y., 1939), *affd.*, 105 F. (2d) 933 (C. C. A., 2d, 1939); *Continental Securities Co. v. I. R. T.*, 165 Fed. 945 (C. C., N. Y., 1908); *Benedict v. Price*, 38 F. (2d) 309 (D. C.,

N. Y., 1929); *Stockton Commission Co. v. Narragansett Cotton Mills*, 11 F. (2d) 618 (D. C., R. I., 1926); and cases cited. Rule 10 (c) of the Rules of Civil Procedure expressly stipulates that a copy of any writing which is an exhibit to a pleading is a part thereof for all purposes.

As the opinion of the Court of Appeals upon plaintiff's petition for rehearing states, plaintiff defeated his own case by pleading too much. Plaintiff refuted the allegations of his complaint by the exhibits attached thereto.

Moreover, it is clear that there is nothing in the allegations relative to the oral negotiations between the parties which adds anything to the exhibits filed with the petition. There is no intimation in the pleadings that the oral terms of any alleged contract between the parties were at variance with the written portions thereof. On the contrary, it must be inferred from the allegations that the oral negotiations were consistent with the written correspondence and dependent upon the terms purportedly established thereby.

There is no allegation that the purported contract for the sale of parcels or any terms of such contract were derived from any oral negotiations. The only oral negotiations alleged bear on the purported contract for the sale of the entire holdings of the defendant. It is

undisputed that the defendant's entire holdings were not sold in one parcel or to one buyer. Therefore under the alleged circumstances of the sale the only contract upon which plaintiff can recover must necessarily embrace terms for the sale of parcels and since the petition is utterly lacking in any allegations establishing parol terms at variance with, or in addition to, the contents of the correspondence, the same conclusion which is applicable to the allegations of a written contract must be reached with reference to the alleged parol and written agreement. Nowhere in the pleadings and correspondence is there any statement of the terms upon which the several parcels comprising the entire tract could be purchased, so that there necessarily could not be any contract with the plaintiff for the sale of separate parcels.

There is no allegation in the petition that the sale of the property in parcels was a fraudulent device to prevent the payment of commissions to plaintiff. Nor is there any allegation whatsoever in the complaint of any fraudulent practice by defendant. Therefore, the statement at page 5 of plaintiff's petition for certiorari that defendant "fraudulently declined to pay the Plaintiff for services which the Defendant had approved and accepted," must be dismissed as an assertion supported only by the over-exuberance of counsel.

V.

The decision of the Circuit Court of Appeals is not in conflict with applicable local decisions.

As a matter of substantive law, there is no possible conflict between the result reached by the District Judge and by the Circuit Court of Appeals and the decisions of the State Courts with regard to the question of the sufficiency of the count of the complaint based upon an alleged *quantum meruit*. The principles established by those cases are entirely consistent with, and are recognized by, the judgments already rendered in this case.

The effect of those decisions is quite apparent. *In solido* they establish that there may be a recovery upon a *quantum meruit* for services rendered by a broker in the sale of real estate, where it is shown that such broker was the procuring cause of the sale and that his services were availed of by the owner. Count 2 of the amended complaint falls far short of alleging that the services of the plaintiff were such as could be characterized in law as the procuring cause of the sales by defendant.

Under an express contract, a broker can recover only when he has been the procuring cause of the sale. And, as a matter of law, finding the prospect and attempting to make the sale are not sufficient to justify payment of commissions. To earn a commission, the agent must, during the agency, find a purchaser ready,

able and willing to buy and who actually offers to buy on the terms stipulated by the owner. *Jordan v. Dolvin Realty Co.*, 54 Ga. App. 472, 188 S. E. 304 (1936). No lesser performance is sufficient when the promise to pay commissions is an implied promise. That is to say, the implied promise to pay the reasonable value of the services rendered is conditioned upon the rendition of such services as can be held as a matter of law to be the procuring cause of a sale. In all of the cases in which recovery has been permitted on a *quantum meruit* for services rendered in the sale of real estate, it was expressly held or found that the services of the broker were the procuring cause of the sale. The cases cited in the dissenting opinion of the learned Circuit Judge sustain this propositon.

In *McDonald v. Cabiness*, 100 Tex. 615, 102 S. W. 721 (1907), the appellate Court sustained a recovery upon a *quantum meruit* where it was expressly found by the trial Court that the plaintiff was the procuring cause of the sale and therefore entitled to a recovery whether or not an express contract was proved. The opinion in *Doonan v. Ives*, 73 Ga. 295 (1885), contains some language to the effect that commissions must be paid when the owner avails himself of the services of a broker. This language can not be considered *in vacuo* as permitting a recovery in every instance where a broker has rendered some services which have been helpful to the owner. All of the other cases in the Georgia reports clearly demonstrate that

the language of the *Doonan* case must be restricted to those cases where it is shown that the services of the broker were the procuring cause of a sale. *Johnson v. Lipscomb-Weyman-Chapman Co.*, 46 Ga. App. 798, 169 S. E. 266 (1933).

Ware v. Reese, 59 Ga. 588 (1877), cannot be relied on to support the plaintiff's contention that his allegations with respect to an implied contract are sufficient. The decision in that case merely holds that a *quantum meruit* count may be joined with a suit upon an alleged express contract. There is no intimation anywhere in the decision as to what extent of performance is required to permit recovery. The *dicta* in *Hill v. Balkcom*, 79 Ga. 444, 5 S. E. 200 (1888), that recovery will be allowed in *quantum meruit* where services are rendered under a contract but complete performance has not been rendered, are inapplicable to brokers' contracts for the sale of real estate. Such contracts are *sui generis* in that in the accomplishment of the specified result the services of the broker are beneficial to the owner only if such result is achieved by the broker's efforts. The principle permitting recovery is the same where recovery is sought on implied contract as in the case of an express contract. In either case, it must be established that the efforts of the broker have been sufficiently important in procuring a sale that it is just that the principal should pay some compensation to the broker. The broker's services are so sufficient only when they may be held, as a matter of law, to be the

procuring cause of the sale. *Beck v. Thompson*, 108 Ga. 242, 33 S. E. 894 (1899), is inapposite for the reasons urged to distinguish *Hill v. Balkcom, supra.*

The decision in *Gresham v. Connally*, 114 Ga. 906, 41 S. E. 42 (1902), is not controlling upon the point for which it is cited in the opinion of the dissenting Judge. The evidence in that case satisfactorily established that the broker was employed by defendant, that he had procured a purchaser who was ready and able to buy and who actually did buy, that the negotiations for the sale were set on foot through the efforts of the broker, that the broker performed every service required by his employment which it was possible to perform, and that failure of the broker to consummate the sale was due to the interference of the owner. It is apparent that the allegations of the amended petition in the present case make no comparable showing. It is nowhere alleged by the plaintiff that his services were of any effect in procuring the sale of defendant's property. The petition completely fails to show that anything the plaintiff did or said, or any information that he gave to defendant with reference to his dealings or his communications with the purchasers, aided the defendant in the final consummation of the sales.

It cannot be disputed that the defendant had not deprived itself of the right to effect sales in its own behalf. And, the plaintiff would not be entitled to commissions merely because he had had some negotiations with the actual purchasers. It is expressly held in

Tidwell v. Hines, 28 Ga. App. 806, 113 S. E. 48 (1922), that an owner may sell to a person with whom a broker has been negotiating but from whom the broker had failed to obtain an offer upon the terms stipulated, provided the sale directly to a customer by the owner is not effected with the fraudulent intention to deprive the broker of his commission.

As was held in the *Jordan* case, *supra*, finding a prospect and attempting to make a sale are insufficient, as a matter of law, to justify the payment of commissions to an agent. It is undeniable that parties may enter into an arrangement whereby the agent is required merely to name prospects, but the allegations and facts apparent on the record disclose that such was not the intention of the parties in this case but that the plaintiff was to negotiate with purchasers and to arrange terms of sale with them. The allegation of paragraph 7 of the amended complaint that "All that petitioner was required to do was to furnish the prospect and the defendant would complete the negotiations resulting in a sale or other contract," (R. 75), in the light of the other facts pleaded, is a mere conclusion of the pleader and is inconsistent with other facts appearing of record. It is manifest that the allegations of the complaint fall far short of establishing a claim upon which relief can be granted on the type of contract definitely alleged and established in *Land Company of Florida v. Fetty*, 15 F. (2d) 942 (C. C. A., 5th, 1926).

VI.

Conclusion.

It is clear that on the record presented the petition for certiorari should be denied. Manifestly, there are no special or important reasons for granting the writ.

In the first place, the decision of the Circuit Court of Appeals is not in conflict with the decisions of any other Circuit Court of Appeals upon the same matter. Nor is the decision of the Court of Appeals in conflict with any applicable local decisions, but is perfectly consistent with the controlling authorities. There is no merit in the contention of petitioner that the Court below has decided an important question of Federal law which has not been, but should be, settled by this Court. It is possibly true that this Honorable Court has not passed on the specific question presented, under the new Federal rules, but the issue is so well settled that instruction by this Court is unnecessary. There is, of course, no claim by petitioner that the decision of the Circuit Court of Appeals is in conflict with applicable decisions of the Supreme Court. The determination of the issue by the District Court and by the Circuit Court of Appeals followed well-settled practice and cannot be said to be in any manner a departure from the accepted and usual course of judicial proceedings such as requires an exercise of this Court's power of supervision. No other grounds for granting a writ of certiorari have been advanced by petitioner, and no other

possible grounds are suggested by the record. The decision of the Court of Appeals was required by the record and is correct both procedurally and substantively. Irrespective of the demonstrable correctness of the decision, the legal question presented is of no general importance, and there are no special or important reasons for granting the writ of certiorari.

Accordingly, defendant submits that the petition should be denied.

Respectfully submitted,

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